

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NORTHWEST MOBILE SERVICES,
L.L.C., an Oregon limited liability company,

Plaintiff,

v.

SCHRYVER MEDICAL SALES &
MARKETING, INC., A Colorado
corporation, and BEN GILSON, an
individual,

Defendants.

Case No. C06-5227 RBL

ORDER GRANTING MOTION FOR
TEMPORARY RESTRAINING ORDER
AND ORDER TO SHOW CAUSE

THIS MATTER is before the court on Plaintiffs' Motion for a Preliminary Injunction [Dkt. #4]. Plaintiff Northwest is the successor to Defendant Gilson's former employer, Portable X-Ray. Defendant Schryver is Defendant Gilson's current employer, and a competitor of Plaintiff Northwest Mobile Services. Plaintiff seeks to enforce the terms of a non-competition agreement it claims Gilson executed as a condition of his employment at Portable. That agreement provides that in the event he leaves Portable's employment, Gilson will not compete "for a period of one year" "at any facility at which [he] provided services while an employee of [Plaintiff's predecessor] within the last year of [his] employment." Plaintiff alleges, and Defendants do not dispute, that Gilson is now providing on Schryver's behalf mobile X-ray services to facilities where he provided similar services in his last year of employment with Northwest's predecessor, Portable X-Ray. Plaintiff seeks a Preliminary Injunction precluding Gilson from continuing to service the facilities he serviced while a Northwest employee, and enjoining Schryver from employing Gilson at such facilities.

1 Plaintiff opposes this Motion arguing (1) that the Plaintiff has not demonstrated its probable success
2 on the merits; (2) that his signature on the agreement is a forgery; (3) that the agreement is void for lack of
3 consideration, as it was purportedly signed a few days after Gilson began working for Northwest's
4 predecessor; and (4) even if the agreement was otherwise enforceable, this Plaintiff was not a party to it and
5 cannot enforce it. The Defendants also downplay the significance of Gilson's role in either entity's business.

6 In order to obtain a preliminary injunction under Fed. R. Civ. P. 65(a), a plaintiff in the Ninth Circuit
7 must satisfy one of two tests. Under the traditional test, a plaintiff must show: (1) a strong likelihood of success
8 on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance
9 of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases). *See Ranchers*
10 *Cattlemen Action Legal Fund United Stockgrowers of America v. United States*, 415 F.3d 1078, 1092 (9th Cir.
11 2005). The alternative test requires that a plaintiff demonstrate *either* a combination of probable success on
12 the merits and the possibility of irreparable injury *or* that serious questions are raised and the balance of
13 hardships tips sharply in his favor. These two formulations represent two points on a sliding scale in which the
14 required degree of irreparable harm increases as the probability of success decreases. They are not separate
15 tests but rather outer reaches of a single continuum. *Id.* (internal citations omitted).

16 The Defendants dispute Plaintiff's ability to demonstrate its right to a Preliminary Injunction on either
17 basis. The Court disagrees with the bulk of Defendants' arguments, as outlined below, but will hold a hearing
18 on Defendant Gilson's claim that his signature on the alleged non-compete agreement is a forgery.

19 **1. Likelihood of success on the merits.**

20 Plaintiff has alleged, and produced evidence in support of its claim, that Gilson signed a non-
21 competition agreement which would preclude him from working for his former employer's competitor. Gilson
22 argues that the Plaintiff will not prevail on its non-compete, trade secrets, or tortious interference claims, for
23 at least the following reasons, each of which is discussed in turn:

24
25 (A). Gilson argues that the agreement is not supported by consideration. He claims that his
26 employment commenced on January 1, 2002, and that he was an at will employee starting on that date. He
27 claims that because the non-compete agreement was not signed (if at all) until January 6, it is not supported
28 by consideration and cannot be enforced against him.

1 This argument is based on *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 100 P.3d 791 (2004).
2 There, the employee was forced to sign an extremely broad non-compete agreement after five years of
3 employment, and the court held that “the promise of future employment” in exchange for the execution of the
4 non-compete agreement was insufficient consideration for that agreement. It contrasted the situation in *Racine*
5 *v. Bender*, 151 Wash. 606, 252 P. 115 (1927), where a non-compete provision was signed at the end of each
6 work week for the better part of a year, and was found to be enforceable. The *Labriola* court also rejected the
7 argument that the employee “received additional training” as consideration for the non-compete, pointing out
8 that he had already received five years of training prior to the non-compete agreement.

9 Here, Gilson allegedly signed the non-compete agreement within a week of the date he commenced
10 work as an at will employee. As the Plaintiff points out, *Labriola* holds that otherwise valid non-compete
11 agreements are valid “if signed when he or she is first hired.” *Id.*, 152 Wn.2d at 834. It is hardly unusual for
12 a new employee to continue the process of finalizing his employment contract documents in the first week after
13 he begins work. If he signed it, Gilson signed the agreement “when he was first hired.” The alleged lack of
14 consideration will not work to defeat the non-compete agreement.

15 (B). Gilson argues that the non-compete agreement is not enforceable because it is not reasonable.
16 He claims the Plaintiff has not made the requisite showing that the agreement was necessary to protect it from
17 any unfair advantage he may have by reason of customer contact, trade secrets, or other confidential business
18 information.

19 The agreement at issue is limited as to time – one year – and as to scope – it only precludes Gilson from
20 servicing those facilities he serviced in his last year of employment at Portable (Plaintiff’s predecessor). The
21 agreement is not unreasonable and is not unenforceable on this basis.

22 Nor is the Defendants’ effort to minimize the importance of Gilson’s position sufficient to defeat the
23 agreement. Entry level salespeople are often asked to agree not to compete as a condition of employment. That
24 Gilson did not know the intimate details of his former employer’s business does not mean that he did not have
25 access to protectable interests, including customer lists and relationships. This argument is insufficient to defeat
26 the non-compete agreement.
27

28 (C). Gilson argues that even if the agreement was otherwise enforceable, the parties to it were

1 Gilson and Plaintiff's predecessor, Portable X-Ray, and that the assignability of that agreement to Plaintiff has
2 not been established.

3 The Plaintiff has in fact established and explained how it purchased Portable and then undertook to
4 terminate and re-hire its employees. It has established that it purchased Portable's assets and its goodwill, and
5 that the better view is that that includes the right to enforce non-competition agreements in favor of its
6 predecessor. *See J.H. Renarde, Inc. v. Sims*, 711 A.2d 410 (N.J. 1998). Plaintiff has not raised an issue as
7 to any defect in the assignment. If the non-compete agreement is valid, Plaintiff is entitled to enforce it.

8 (D). Gilson argues that the Plaintiff cannot demonstrate that it is likely to prevail on its tortious
9 interference claim¹ against Defendant Schryver, because Schryver was "careful" to ensure that Gilson was not
10 a party to any non-compete agreement. This claim is asserted against Mr. Gilson's new employer. Defendant
11 Schryver claims it took steps to ensure that Gilson had not signed such an agreement, which only suggests that
12 it knew employing one who was subject to such an agreement might lead to liability. Furthermore, it is clear
13 that Schryver was expressly made aware of Plaintiff's claim about the agreement at a later date, when Plaintiff
14 informed it of the agreement and its position that Schryver's continued employment of Gilson was a violation
15 of it. In any event, the real issue is the Plaintiff's motion to enjoin Gilson from working in violation of his
16 agreement and if he is so enjoined, it necessarily follows that he would not be employed by Schryver in
17 violation of that injunction.

18 **2. Irreparable Harm/ Relative Hardship.**

19
20 Leaving aside for the moment Defendants' primary forgery argument, it is also clear to the court that
21 the second prong of the preliminary injunction test is met by the Plaintiffs assuming that the document is
22 authentic. The plaintiff has established that Defendants' ongoing use of Gilson to service former clients in
23 violation of the alleged agreement is causing it irreparable harm. And while there is hardship to Defendant
24 Gilson in being enjoined from performing his job, the hardship to Plaintiff's business and relationships with its
25 customers in the event the agreement is authentic, is greater.

26 * * *

27
28 ¹Gilson also argues that Plaintiff cannot demonstrate the likelihood of its success on its trade secrets
claim, but Plaintiff does not seek an injunction on that claim.

1 Finally, and most importantly, Gilson has raised genuine issues of fact as to the agreement's
2 authenticity. Gilson claims as a factual matter that he did not and would not sign a non-competition
3 agreement. He suggests that the signed agreement produced by the Plaintiff is either a straight forgery or a
4 "cut and paste" forgery. He asserts that he did not sign a non-compete agreement and is not bound by its
5 terms.

6 This is the Defendants' primary argument, and is the most difficult to resolve. Plaintiff argues that
7 there is no evidence that the non-compete agreement in evidence (a copy of an original which apparently
8 cannot be located) is "irregular in any way." Gilson counters that in addition to the fact he chose not to
9 sign such an agreement and that the one offered is not an original, the agreement differs from the one he
10 was sent, is not on Portable's letterhead, and that the signature of Portable's representative is not the same
11 as on the one he was offered.

12 As an initial matter, the fact that there are various versions of the document in existence does not
13 establish that the copy in evidence is not genuine. Since the Plaintiff's Motion was filed, Gilson has claimed
14 that he was philosophically and economically opposed to signing an agreement, and that that is why he
15 chose not to sign the one proposed by Portable at the commencement of his employment there. He does
16 not address or explain why they would continue to employ him absent his signing, and seeks an opportunity
17 to explain or rebut Plaintiff's allegation (in its Reply) that he signed a similar non-compete agreement for
18 Portable's predecessor (Symphony) just six months earlier.

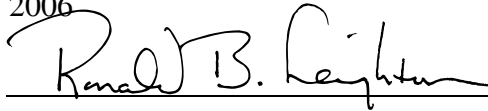
19 Because the authenticity of the purported non-compete agreement is in the court's view dispositive
20 on the motion for a preliminary injunction, the court will hold an evidentiary hearing on this issue. At that
21 hearing, Plaintiff will be afforded the opportunity to produce evidence about the agreement's execution and
22 defendants will be permitted to produce evidence supporting their "forgery" defense, as well as to respond
23 to the allegations that other Northwest employees also were provided multiple copies of the agreement, and
24 that Gilson signed a non-compete with Symphony.

25 If the court determines that the document is authentic, the Plaintiff's motion for a preliminary
26 injunction will be granted.

27
28 THEREFORE, it is hereby ORDERED

1 The parties will appear Thursday, July 6, 2006, at 9:30 for an evidentiary hearing on the authenticity
2 of the purported non-compete agreement. The remaining issues raised in opposition to the Plaintiff's
3 Motion for a preliminary injunction need not be addressed.

4 DATED this 28th day of June, 2006

5 

6 RONALD B. LEIGHTON
7 UNITED STATES DISTRICT JUDGE
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28